

# **STRENGTHENING JUDICIAL REFORMS IN KENYA**

## **Volume IV**

**Performance indicators: Public Perceptions of  
the Court Divisions, Children's Court and the  
Anti - Corruption Court**

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The views in this report however are those of ICJ Kenya.

**Kagwiria Mbogori**  
**Executive Director**

## Foreword

As has been the case with our previous publications in this series, this report aims at supporting effective interest group demand for judicial reform. This is the fourth publication in the series.

ICJ Kenya continues to perform internal analysis of the Judiciary as well as content analysis of its reform proposals and implementation, mainly to test them for parity with ICJ Kenya and other stakeholders' demands.

Since 2000, ICJ Kenya has sought public perceptions to interpret reform needs and leverage reform demand. During this period, ICJ Kenya has carried out a number of quantitative and qualitative surveys on judicial corruption, efficiency and effectiveness in the Kenya Judiciary whose findings have been published in our previous reports<sup>1</sup>.

Since our first publication in 2001, corruption has remained a very serious problem in the Judiciary. Bad decisions, case backlogs, case delays and other forms of inefficiency have also continued to bedevil the Judiciary.

This publication closely examines some of the administrative reforms that have been undertaken by the Judiciary in a bid to address some of the problems that face the Judiciary. The publication looks at the creation and impact on the administration of justice of the newly created Children's Court, Magistrate's Corruption Court and the four High Court divisions, namely, Family, Commercial, Criminal and Civil divisions. The objective of the publication is to inform and educate the public and interest groups on judicial reform attitudes, initiatives, objectives and various reasons for their success or failure.

**Kagwiria Mbogori**  
**Executive Director**

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<sup>1</sup> - Strengthening Judicial Reforms – Performance indicators : Public Perceptions of the Kenya Judiciary, 2001  
- Strengthening Judicial reforms in Kenya, Volume II : The role of the Judiciary in a patronage System, 2002  
- Strengthening Judicial reforms in Kenya, Volume III : Kenyan Judiciary in the new Constitution, 2002

## INTRODUCTION

For a long time now, the Kenya Judiciary has been experiencing various problems that have resulted from and into inefficiency, incompetence and corruption. Chronic problems that have infiltrated into the Kenya Judiciary include, lengthy case delays and backlog; limited access by the public; lack of adequate facilities; allegations of corrupt practices; cumbersome laws and procedures; questionable recruitment and promotional procedures; general lack of training; weak or non-existence of sanctions for unethical behaviour and inequitable budget. The inefficiency, incompetence and corruption in the Judiciary has resulted into loss of public confidence in the institution.

It is on this basis that in 1998, the late Chief Justice Z.R. Chesoni appointed a committee to look into these issues and propose remedial measures. In appointing the committee the Chief Justice stressed,

*‘The need for the Judiciary to inspire confidence in the Kenyan public, who have perceived it with fear and suspicion; that the necessary steps need to be taken to improve the image and performance of the Judiciary in the administration of justice.’<sup>2</sup>*

A six-man committee headed by Justice Richard Kwach, Judge of the Court of Appeal<sup>3</sup> was appointed to carry out this task on the following terms of reference;-

- In regard to maintenance of Judicial Rectitude of Judicial Officers in the discharge of their judicial functions;
- On the existing system on possible improvements of better alternatives to performance appraisal, promotional incentives, in-house training and any other matter related thereto;
- With regard to the structure, organization, personnel and any other matters related to the operation and problems in the court registries;
- On the improvement of physical working conditions of the judicial personnel, physical facilities, equipment and other matter related thereto;
- On possible improvement on the allocation, disposal and follow-up procedure of cases in all courts;
- On how the flow of human traffic into and out of court premises (excluding judicial staff) may be guided and controlled with a view to eliminating busy-bodies therefrom and thereby improve security for the judicial staff and property;
- On how to make the administration of justice, time and cost effectual; and
- On any other matter(s) pertaining to improvement of the administration of justice in Kenya and in the making the same consumer friendly.

At the end of its work the committee came up with various recommendations and proposals for implementation. Under the administration of justice, time and cost effectual mandate, the committee recommended among other things, the splitting of the High Court in Nairobi

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<sup>2</sup> Report of the Committee on the Administration of Justice, pg 3

<sup>3</sup> Other members included Justice Samuel Bosire, J.A; Justice John Mwera; Hon. Aggrey Muchelule; and Hon. Jessie Lesiit and Hon. William Ouko as Joint Secretaries.

into four divisions, namely, Family, Criminal, Civil and Commercial divisions, each with its own registry, which together will comprise the Central Registry.<sup>4</sup>

The committee also addressed the issue of corruption in the Judiciary and gave various recommendations geared towards curbing this problem. This included adoption of a code of ethics for judicial officers and the entire staff of the Judiciary.

Upon the completion of its work, a new committee headed by Justice Evans Gicheru, Judge of the Court of Appeal was appointed to outline the modalities and oversee the implementation process of the previous committee's recommendations and proposals.

Since then, the Judiciary has undertaken several administrative reforms aimed at improving efficiency and effectiveness in the Judiciary as well as curbing judicial corruption. Among the key administrative reforms undertaken, are the creation of court divisions within the High Court, establishment of the Children's Court and creation of a Magistrate's Corruption court. Other measures undertaken include the drafting of the code of conduct for judicial officers in 1999.

Although these reforms have been undertaken, there is still a lot of hue and cry about judicial performance and independence by our Judiciary. Most commentators state that the reforms undertaken are very cosmetic and will not have any meaningful impact on the administration of justice.

Various issues have been highlighted which must be addressed if the Judiciary hopes to attain any meaningful change, enhance performance and curb corruption. Some of the most grave issues that are bedeviling the Judiciary and must be addressed in earnest include:-

### **1. Personal Incompetence.**

It has been alleged with strong backing that there are many judicial officers, especially the judges, who are inept. This has been arrived at after due consideration of the quality and consistency of judgments that are issued, the manner in which matters are handled and the level of judicial activism in courts today.

This incompetence has been attributed to the appointment and promotional criteria of judges. Loopholes in this area have contributed to the appointment and promotion of people who otherwise do not qualify to occupy such an important office that calls for high level of competence, efficiency, independence, integrity, knowledge, honesty, trust and impartiality. Appointment of judges in the recent times has been based not on merit but on other considerations such as [tribe and political affiliation](#).<sup>5</sup>

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<sup>4</sup> Report of the Committee on the Administration of Justice, pg 51

<sup>5</sup> Strengthening Judicial reforms in Kenya, Volume II : The role of the Judiciary in a patronage System, ICJ –K, 2002, p. 26 -27

Some judicial officers do not observe punctuality and promptness in reporting to work as well as dispensation of cases, a factor that has to some extent contributed to the chronic case backlogs in the Judiciary<sup>6</sup>.

## **2. External Interference.**

In an ideal democracy, the Judiciary must be independent and allowed to decide matters before them without any restrictions, improper influences, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

It is disturbing to note that since independence, the Judiciary has had to endure immense interference from other quarters especially the Executive arm of government. These interferences commence at the level of appointment of judges, which is done by the President. Past experiences have shown that these appointments are made with little or no consultations with other stakeholders, including the Judicial Service Commission which is mandated to make recommendations on who is to be appointed a judge.

Lack of fiscal autonomy has also yielded ground for external interference.

In recent times, there has been a worrying trend of the abuse of the sanctity of courts by parties to proceedings both in civil and criminal matters. Among those who top this list of shame include politicians both in the ruling party and the opposition and students from higher institutions of learning, who mob the courts with crowds with a view of intimidating judicial officers and the due process of law.

## **3. Lack of Training**

Even though most of the judicial officers, both judges and magistrates possess academic credentials that qualify them to occupy these offices, most of them have never taken part in the Continuous Legal Education, otherwise known as Continuing Professional Development, in order to keep abreast with the current developments in practice and in law. This is either by personal choice or due to external barriers<sup>7</sup>. Continuous Legal Education (CLE) is an important ingredient to the attainment of judicial reform and the growth of law, hence cannot be sidelined for whatever reason.

Most judicial officers mandated with special tasks within the Judiciary **should** undergo special training to effectively equip them with the knowledge and skills required to carry out these tasks. Among the special tasks that require special training include administrative skills for those in-charge-of departments and divisions and those presiding over special courts such as the Children's courts. This problem was also acknowledged in the Kwach's committee, which recommended that a Judicial Training Committee be established with a judge of appeal as its chair and members drawn from the High Court, Magisterial bench, and

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<sup>6</sup> See the 'Report of the Committee on the Administration of Justice' and 'Strengthening Judicial reforms in Kenya, Volume II : The role of the Judiciary in a patronage System, ICJ –K, 2002'.

<sup>7</sup> Judges and other judicial officers require prior approval of the Chief Justice to attend workshops, seminars including judges' colloquia outside Kenya.

paralegal cadre, with a sole task of coordinating training for all judicial officers at all levels<sup>8</sup>. Lack of training in any judicial system, adversely affects judicial performance.

To date, very few judicial officers have embraced the principles and acquired skills in information technology. This is despite various efforts by other stakeholders in supporting the initiative either financially or through supply of equipment. Today, information technology forms an integral part in the operations of any sector and its application in the Judiciary will without a doubt enhance delivery of justice, since matters will be dispensed off faster and there will be good track of judiciary records including case files.

Training in management skills cannot also be ignored. Such skills will go a long way to improving access to justice. Skills acquired from courses such as Total Quality Management will foster efficiency and quality services.

ICJ Kenya is proud to have taken the initiative of training paralegals from all the four divisions of the High Court on these skills. In these courses ICJ Kenya sought to impart skills on, *inter alia*, self-discipline; timeliness; customer care and personal growth. The drive to train paralegals emanated from the realization that paralegals in various sections represent the image of the Judiciary to the public. More often than not, they are the first people members of the public encounter when they visit the courts. Their treatment and attitude towards members of the public greatly determines the next step a potential consumer of justice will take which will ultimately impact negatively or positively on accessibility to justice.

#### **4. Lack of Adequate Facilities and Personnel**

The Kenyan population has been rapidly growing over the years. However, it is unfortunate to note that the Judiciary, like many other institutions has not been expanding in proportion to the population growth. Currently, there is a lot of pressure on the few judicial officers and courts available. For instance, there are forty seven (47) judges serving a population of over thirty (30) million, which translates to over 600,000 people per judge. The pressure is not only exerted onto the personnel but also onto the court structures. This problem is mainly attributed to lack of adequate finances.

All courts in the country lack equipment and tools such as chairs, computers and desks among others. They also lack such facilities as libraries, reception area and office space. Most court stations lack adequate space to accommodate judicial officers and registries, which greatly hampers judicial performance.

Granting the Judiciary fiscal autonomy will go a long way in improving judicial performance since it will guarantee the Judiciary control over its finances and hence it can allocate them appropriately to meet its needs.

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<sup>8</sup> Report of the Committee on the Administration of Justice, p.17



## 5. Lack of Information on the Judiciary

One of the main obstacles to access to justice in this country is lack of information on the Judiciary. For a very long time, the Judiciary has operated in secrecy, closely knitted to itself that very few people know of its functions and operations. In order to maximize the use of this institution, there is need to improve on the availability and dissemination of information on this very important institution. In the past, there have been suggestions to create a Public Relations Office duly responsible for disseminating information and responding to public concerns on the Judiciary.

From our recent survey, the media especially the print media has remained the most important channel through which information on the Judiciary is transmitted. Up to 75% of the total sample responded that they get information on the Judiciary through the print and electronic media. The Judiciary itself either through a designated office or the registry did not perform as well. This therefore, attests to the fact that information flow from the Judiciary to the public is very much wanting. It need not be emphasized that in order to have effective judicial reforms, the public must be involved and for such a public to effectively participate, they must be informed. Since it is evident from our survey that the media plays a crucial role in the dissemination of information on the Judiciary, it is important that these two institutions work closely especially in pursuit to judicial reform in Kenya.

## 6. Corruption

Corruption has taken root in every sector of this country that even the Judiciary has not escaped it. Various reports published especially from mid-eighties to date have indicated that corruption is very serious in the Judiciary. Thus the Judiciary is no longer viewed to be above suspicion and consequently, many people no longer look up to it as the protector and guarantor of citizens' rights and freedoms.

The institution has turned into an arena where the ruling class and the rich exert their might on the ruled and disadvantaged citizens. For instance, on numerous occasions, government officials and the wealthy have used this institution to get illegal orders for their own selfish interests without due consideration to the law and/or people's rights.

A few years ago, [Mazingira Institute](#)<sup>9</sup> launched a vigorous campaign against judicial corruption using the slogan 'why hire a lawyer when you can buy a judge'. Such sentiments illustrate public perception of the Judiciary today. Judicial corruption has resulted into injustice and catalyzed the recent spate of people taking the law into their own hands through 'mob justice'. An increase in such cases of mob justice and high rate of crimes have been directly linked to judicial corruption and flawed judicial system.

High level of poverty in the country has not helped much in the fight against judicial corruption. Chapter three of this publication offers an in-depth analysis of judicial corruption.

Non-performing Judiciary and a flawed judicial system in general, have contributed to loss of public confidence in the Judiciary. This is worrying trend since public support is crucial for

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<sup>9</sup> A local NGO

the realization of any successful judicial reforms. Therefore, it is imperative that the Judiciary opens up to other stakeholders and embark on a serious clean-up exercise in its pursuit to judicial reform, even if it is only intended to gain public confidence, support and trust.

## **QUALITATIVE SURVEY**

This survey was conducted in Nairobi within the month of September 2002 and it mainly targeted lawyers and professionals from other sectors that have a keen interest in judicial reform. This includes personnel from the Civil Society especially the Legal/Human Rights NGOs, Economic and the Integrity (Anti-Corruption) Lobby group, the private sector and other key member of the public.

### **Objective**

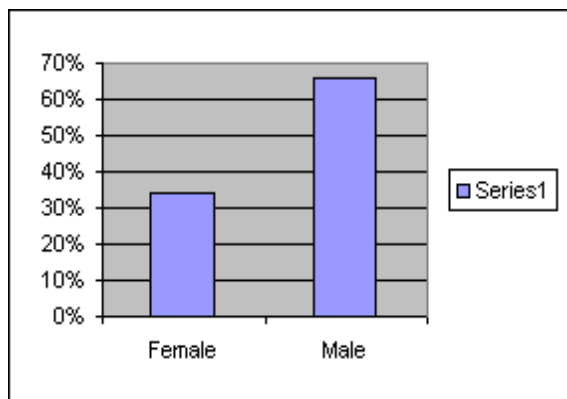
The key objective of conducting this survey was to identify perceptions of the public consumers of justice in undertaking reforms and assessing judicial reforms already undertaken and their impact on the administration of justice in Kenya.

### **Methodology**

A questionnaire was used in order to capture a representative sample of the whole consumers of justice. A total of four hundred (400) face-to-face interviews were carried out.

#### **Sample distribution by sex**

Female	34%
Male	66%



## **Chapter One**

### **COURT DIVISIONS**

Since late 1990s, the Judiciary has undertaken several administrative reforms aimed at improving its performance as well as curbing judicial corruption. Most of these reforms emanated from the recommendations made by the Committee on the Administration of Justice, popularly referred to as the Kwach Committee. Among the key administrative reforms undertaken, include the creation of court divisions within the High Court. The Committee on the Administration of Justice headed by Hon. Justice Richard Kwach, J.A. (1998) recommended that in order to improve efficiency and effectiveness in the Judiciary in so far as dispensation of cases are concerned, there was need to split the Judiciary into four main divisions.

A couple of years down the line this recommendation has been implemented with the creation of the Criminal, Civil, Commercial and Family divisions within the Nairobi High Court. The Civil, Criminal and Family divisions have their registries and operations housed at the High Court buildings in Nairobi, whereas, the Commercial division which was launched in 1997 is situated in a separate building in Milimani area.

Each one of these divisions has its own registry and is headed by a judge of the High Court of Kenya who oversees the general operations of the courts<sup>10</sup>. The day to day operations of each division are managed by a qualified magistrate, called a Deputy Registrar. Other than managing the staff and general supervision of the registry, the Deputy Registrar also hears interlocutory applications.

In September 2002, at least one year since the divisions were created, ICJ (Kenya) carried a survey to assess;

#### ***a) Awareness on the existence of these divisions***

The survey findings showed that most people were aware of the existence of the court divisions.

#### ***b) Levels of efficiency and effectiveness of each division***

The study showed that the Commercial division was the most efficient division, followed by the Family division and Civil division respectively. Criminal division was found to be the least efficient of all the four divisions. Overall, the level of efficiency in the divisions averaged 44% which is below the optimum level.

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<sup>10</sup> - Criminal Division is headed by Justice Mboghali Msagha

- Commercial Division is headed by Justice Tom Mbaluto

- Family Division is headed by Justice Joyce Aluo

- There is no permanent head of the Civil Division as yet. This is done on rotational basis monthly.

**c) *Levels of corruption in each division***

The Family division was found to be the least corrupt with the Civil division being listed as the most corrupt division. 73% of the total sample showed that corruption was serious in the court divisions. This is a bleak picture of the entire Judiciary as far as corruption is concerned.

**d) *The general impact on the administration of justice that these divisions have had since their inception.***

Majority of the respondents stated that the court divisions if properly constituted and established would have a positive impact on the overall administration of justice in Kenya. However, they stated that in order for this to be achieved the following issues must be addressed;-

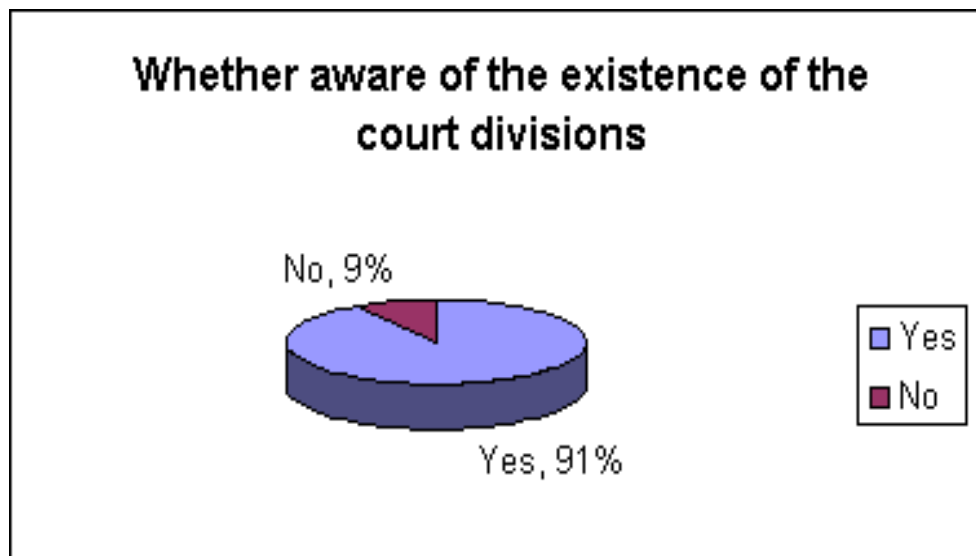
1. There is need to promote and protect the independence of the Judiciary in Kenya.
2. The need to fight corruption within the Judiciary and all other sectors as a whole.
3. The need to change appointment and promotional criteria for judges so as to ensure that, only qualified and competent persons are appointed as judges.
4. The need to fight the problem of case backlogs caused by among other things, numerous adjournments, injunctions, complex and lengthy rules and procedures.
5. The need to have specialized training for judicial officers in charge of these divisions as well as enhancing training for all judicial officers and staff.
6. The need to revise litigation fees so that many people can access the courts. This problem however, is not generated by the Judiciary but is largely attributed to the high level of poverty in the country. Hence the problem requires concerted efforts by all stakeholders to root it out, by fighting poverty.

Refer to the charts herein for graphical representation of the survey findings.

The study confirmed that the impact of these divisions on the administration of justice has not been felt by most Kenyans. Various reasons for this were cited. They include;-

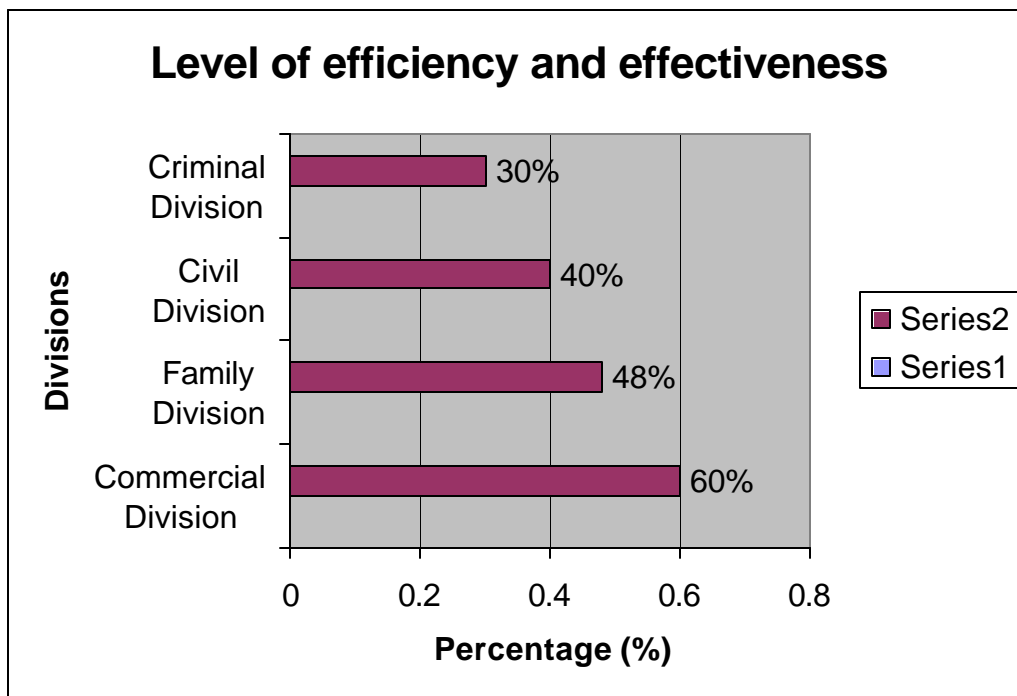
- Lack of judicial independence.
- Rampant corruption in the Judiciary.
- Incompetence of individual judicial officers
- Case backlogs caused by due numerous adjournments, injunctions, complex and lengthy rules and procedures.
- Lack of specialized training for judicial officers in charge of these divisions
- Poverty. This has locked out many Kenyans cannot afford the high cost of litigation.

**Whether awareness of the existence of the court divisions**



Majority of the respondents were aware of the existence of the court divisions

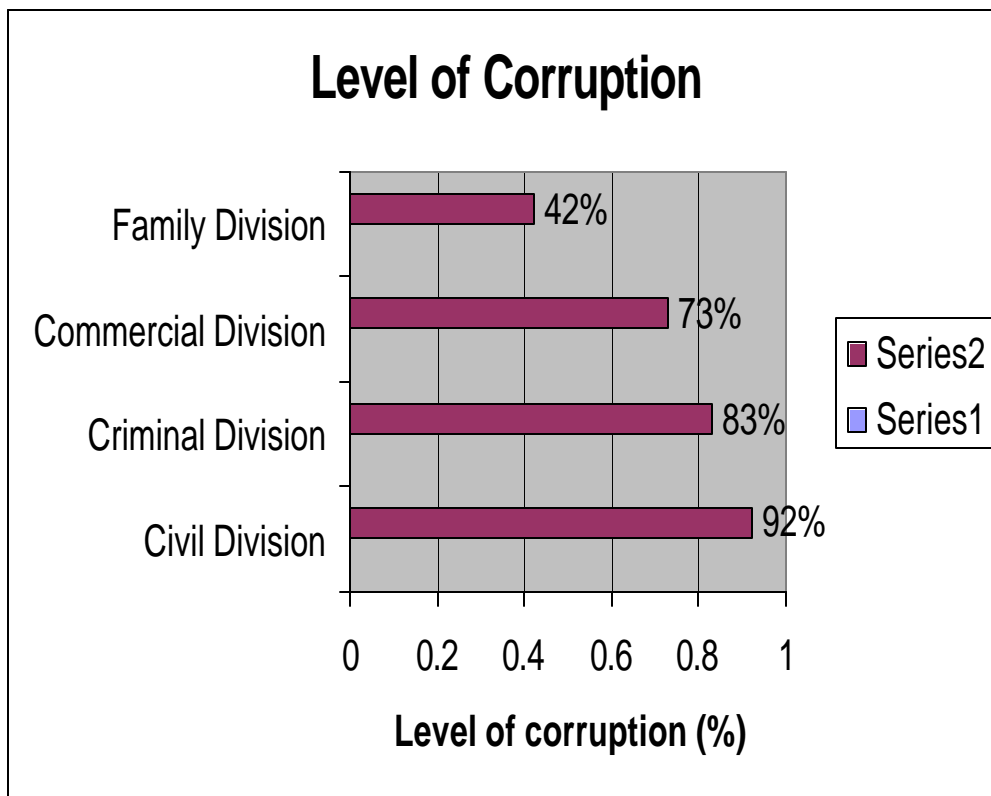
### Level of Efficiency and Effectiveness



### Notes

- Commercial division was found to be the most efficient division. Followed by the Family and Civil divisions respectively.
- Criminal division was the least efficient of all the divisions.

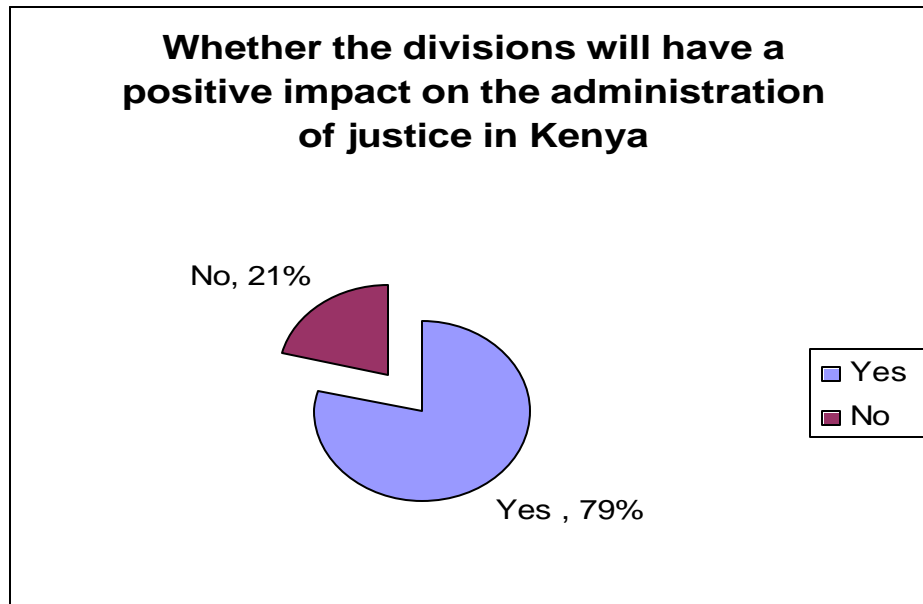
### Level of corruption



### Notes

- The Family division was found to be the least corrupt of all divisions, while the Civil division was found to be the most corrupt of all divisions.
- 73% of the total sample found corruption to be serious in the four divisions of the High Court.

### Whether the divisions will have a positive impact on the administration of justice



#### Notes

- 79% of the respondents thought the court divisions will improve the administration of justice in Kenya.
- 21% thought the divisions will not have any positive impact citing the following reasons:-
  - Lack of independence of the Judiciary
  - Rampant corruption in the Judiciary
  - Incompetence of individual judicial officers
  - Case backlogs
  - Lack of training
  - High cost of litigation.



## **Chapter Two**

### **CHILDREN'S COURT**

Children's Courts are special courts established to deal with children's matters. These courts are established under section 73 of the Children's Act of 2001, which became operational on the 1<sup>st</sup> day of March 2002.

Part VI of the Act establishes and outlines the role of these courts. It also gives guidelines on the cases the courts can hear and how children will be handled in these courts.

#### **○ JURISDICTION**

The Children's Courts are set up to hear cases concerning the following,

- I. Parental responsibility,
- II. Children's institutions,
- III. Custody and maintenance,
- IV. Guardianship,
- V. Orders for the protection of children,
- VI. Children in need of care and protection,
- VII. Foster care placement and
- VIII. Child offenders.<sup>11</sup>

The Courts also have the jurisdiction to hear cases where a person is charged with an offence under the Children's Act<sup>12</sup>.

However, the courts do not have the jurisdiction to hear cases where a child is charged with murder, or where a child is jointly charged with adults<sup>13</sup>. In addition, these courts do not have the jurisdiction to hear adoption cases which are only heard in the High Court.

#### **○ SITTING OF CHILDREN'S COURT**

The Act provides that the Children's Court will be in a separate building (where possible) or room from the ordinary courts to maintain privacy. Only court officials, people involved in the case and their lawyers, journalists and parents or guardians of a child brought before the court will be allowed in the courtroom. The court may also allow some people special permission to attend the hearings<sup>14</sup>. If a child is a witness in a sensitive case like rape, the court may ask people who are not directly involved in the case to leave the courtroom.

#### **○ PROCEEDINGS IN THE CHILDREN'S COURT**

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<sup>11</sup> see s.73(a) of the Children's Act

<sup>12</sup> supra s. 73(c)

<sup>13</sup> supra s. 73(b)

<sup>14</sup> supra s. 74

Among other procedures, in any proceedings concerning a child, his name, identity, school, home or last place of residence shall not be published in the media or any report. Nor shall the particulars of the child's parents or relatives, any photograph or any depiction or caricature of the child<sup>15</sup>.

Before making any orders in respect of a child, the court is required to consider whether the order will be beneficial to the child. It must also consider the child's feelings, wishes, needs and or any other special circumstances like disability and drug abuse<sup>16</sup>.

The Act also provides for legal aid. Under the Act, the court may order that a lawyer represents any unrepresented child before the court<sup>17</sup>. The court may also appoint a guardian *ad litem* to attend court on behalf of the child to protect the interests of such a child<sup>18</sup>.

Unless otherwise provided under the Children's Act, appeals in any civil and criminal proceedings in the Children's Court, shall lie to the High Court and a further appeal to the Court of Appeal<sup>19</sup>.

Currently, there are over forty magistrates in all the eight provinces presiding over the Children's Courts<sup>20</sup>.

Before the establishment of the Children's Courts, there were Juvenile Courts that dealt with some matters involving children. These courts have since been abolished.

## **OVERVIEW OF THE CHILDREN'S ACT**

The Children's Act is a law enacted to promote the well being of the children in Kenya. The Act is a merger of the repealed Guardianship of Infants Act, Adoption Act and Young Person's Act, which have been harmonized and updated.

The Act addresses the rights a child is entitled to and the role of the government and parents in protecting these rights. Most of the rights are contained in and borrowed from the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child to which Kenya is a signatory. The enactment of this law was part of the government's obligation to ensure that provisions of the international instruments on children rights were domesticated into municipal law.

The Children's Act is divided into fourteen (14) parts, each dealing with a specific issue. Among issues tackled in these Act include;

- Key definitions
- Setting out of the general roles and responsibilities of parents in ensuring the well being of the child

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<sup>15</sup> supra s. 76(5)

<sup>16</sup> supra s. 76(3)

<sup>17</sup> supra s. 77

<sup>18</sup> supra s. 79

<sup>19</sup> supra s. 80

<sup>20</sup> Appointed by the Chief Justice under s. 73(d)(ii) of the Children's Act.

- Establishment of institutions dealing with children and
- Guidelines on issues of children's welfare, legal aid, custody and care of children, foster care, guardianship and adoption.

Even though the Act has endeavoured to address most of the children's rights issues, there are still some key matters that the Act has not adequately addressed. For instance, the Act does not adequately address issues affecting street children and children born out of wedlock. It is unfortunate that these children are not adequately covered by the Act yet they are the most vulnerable and marginalized group hence require more protection. It is important that the Act is revised to seal this loophole as soon as possible.

## **CHILDREN'S COURTS PERFORMANCE**

In September 2002, ICJ (K) undertook the initiative to assess this Courts' impact on the administration of justice and the promotion and protection of children's rights in Kenya. It must be acknowledged that the results were not very objective considering the fact the survey was carried out just a few months after the establishment of the courts. However, the study brought to the fore various issues that must be tackled to enhance the success of these Courts. The issues that threaten the success of these courts and which must be addressed in earnest include:-

### **I. Lack of Training**

Recommendations made in the report prepared for the Committee on the Rights of the Child by Human Rights Watch April 19, 2001 highlighted the need to devote resources to the training of magistrates on how to handle children's cases which were being handled in the Juvenile Courts. This recommendation still applies to the Children's Courts which are experiencing similar need. Judicial officers presiding over matters in these courts need special training so as to equip them with the knowledge and skills required to tackle such special cases. It is encouraging to note that the Judiciary has already begun the exercise of training and sensitizing magistrates presiding in these courts.

It ought to be emphasized that the special training should not only be confined to judicial officers but also to all persons who in one way or the other are actively involved in juvenile justice and other matters concerning children. Thus the training should be extended to personnel in the rehabilitation and remand homes, police officers, administrative officers, children's officers, labour officers, counselors, probation officers among others. Training and sensitization of all key players will enhance the success of these courts.

### **II. Lack of Adequate Facilities and Personnel**

The Children's Courts require a lot of physical, financial and personnel resources without which, their existence and performance are threatened. A lot of structural expansion and development needs to be put in place both within the Judiciary itself and the other auxiliary institutions such as the rehabilitation and remand homes.

Funds remain the central factor to the success of these courts. The Children's Act provides for legal aid which must be funded. The expansion and erection of new structures to cater for the space needs under this system call for financial back-up. Funds are also important in the sustenance and recruitment of personnel both in the Judiciary and the other auxiliary institutions. The absence of financial independence in the Judiciary sends negative signals as far as financial capacity of the Judiciary to fully run these courts is concerned. The government's performance and commitment in the past on similar initiatives paint a faint picture on the success of these courts. This means the legal aid provided for under the Children's Act might not be implemented hence throwing the courts' operations into jeopardy.

Other facilities needed in addition to the structures and personnel include, chairs, office and reception space, computers, libraries, books, among others. These facilities and equipment already lack in the mainstream Judiciary and the other existing courts. It is therefore imperative that the Judiciary work with other stakeholders in addressing this problem.

### **III. Lack of Information on the Children's Courts**

Just as is the case with the other courts and the Judiciary in general, there is lack of information on this court and the Act itself. This problem forms one of the main obstacles to access to justice in Kenya today.

The Children's Act is the main instrument so far as the establishment and operations of these courts are concerned. Therefore, the success of these courts is dependent to a large extent on the success and awareness of the Act. There is need to sensitize and increase awareness on the Act to the general public with special interest to the children and parents in particular. Our recent study confirmed that, almost half of the respondents were not familiar/conversant with the Children's Act.

Worse still, 57% of the respondents had no idea about the Children's courts' jurisdiction, rules and procedures. This means accessibility to these courts is very difficult and minimal.

It is important that the Judiciary and all stakeholders launch an aggressive awareness campaign. Sensitization of the public can be carried out through the media, both print and electronic, which have proved to be the most popular source of information on the Judiciary, as was confirmed in our recent and past surveys. For instance, the recent study showed that 60% of the respondents got information on this court and the Children's Act through the media. We therefore propose that during the campaigns to popularize the Act and the courts, the Judiciary works closely with the media houses. Key areas that need to be emphasized in the awareness campaigns are the jurisdiction of the courts, functions and operations of the courts as well as provisions of the Children's Act itself. From our survey most respondents stated that lack of information was the main threat to this court's success.

### **IV. Corruption**

Corruption remains one of the biggest threats to the existence and success of the entire judicial system. With a corrupt judicial system the very essence of promoting and protecting children's rights through these courts remain under immense threat. There are voices which

state that the Judiciary cannot be trusted with this noble task owing to its past performance and experience in such other issues.

From our survey most respondents expressed their optimism of this court fostering Children's rights in Kenya. However, there are those who argue that the courts won't achieve much, because its own inception has been misconceived. They argue that this court would have achieved more if it had been established as a tribunal rather than part of the mainstream Judiciary.

Cases of overlap of some matters also create a lot of unease so far as the success of the court is concerned. Some matters stipulated as Children's court matters also fall within the jurisdiction of other courts such as the Family division. It has been argued by the opponents of these courts that most of the matters vested in the Children's courts would have been effectively handled in the Family division. For example, matters regarding custody would have been adequately addressed in the Family division as an ancillary proceeding to matrimonial proceedings. .

Inaccessibility to the court by most children due to lack of education, cultural barriers, attitudinal biases, poverty, corruption, high litigation fees<sup>21</sup>, geographical location, complex rules and procedures largely threaten the success of this court.

From our survey findings, inaccessibility to this court was ranked second as the most threatening factor to the success of these courts, only after lack of information.

76% of the respondents concurred that this court is not easily accessible owing various factors as mentioned above. An overwhelming 94% of the respondents called for the establishment of this court all over the country to increase accessibility.

Apathy among Kenyans on most issues including matters dealing with children is also seen as a threatening factor to the success of this court. This means unless people's attitudes change, it will be very difficult for this court to succeed. For instance, it will be difficult to get legal representation from lawyers, most of whose services children litigants cannot afford.

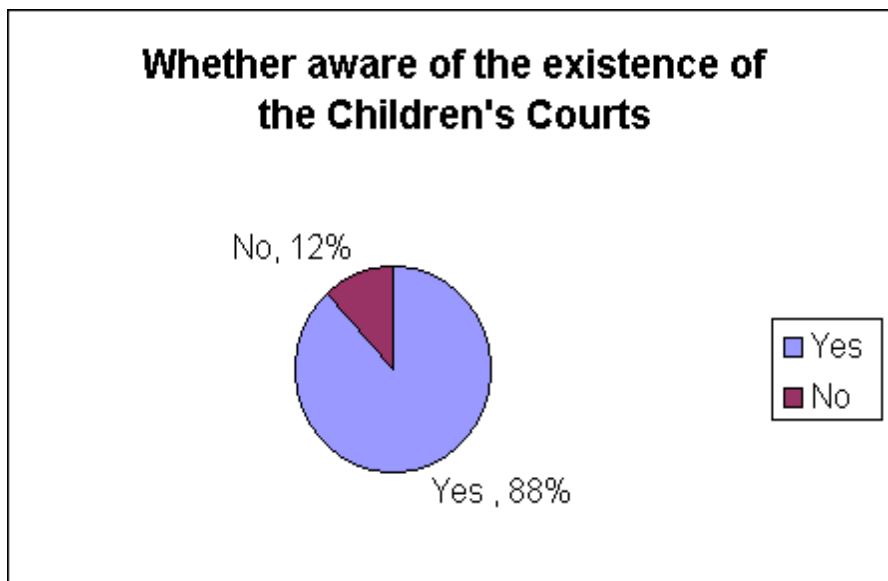
In addition, other factors that must be addressed to enhance the success of these courts include the following:-

- ❖ Involvement of all stakeholders, especially parents, teachers and the society at large in fighting for the children's rights.
- ❖ Clearly defining the role of the police force in the operation of these courts. Some respondents argued that the police force should be excluded from these courts completely.
- ❖ Enhancement of sentences for crimes committed against children.

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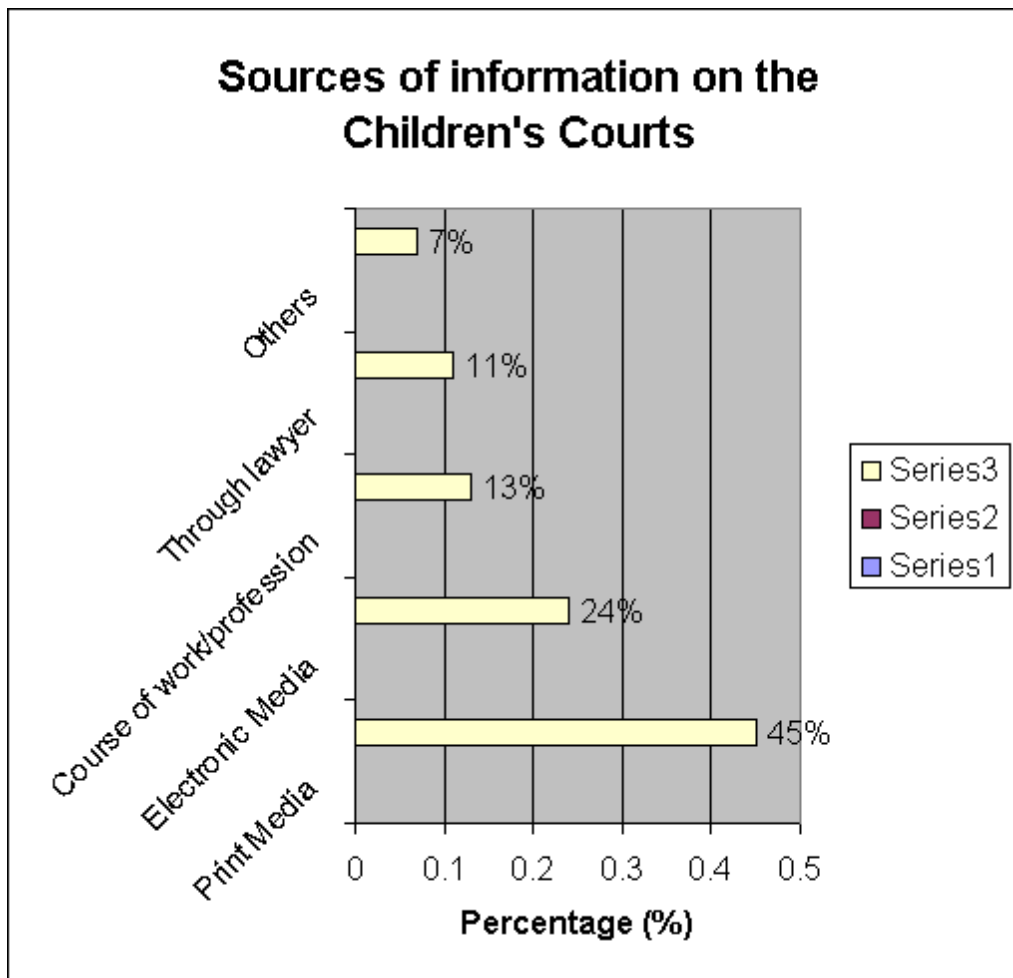
<sup>21</sup> There is no clear policy on legal aid by the government as provided for in the Children's Act.

**Whether aware of the existence of the Children's Court**



Majority of the respondents were aware of the existence of the Children's Courts.

### Source of information on the Children's Courts

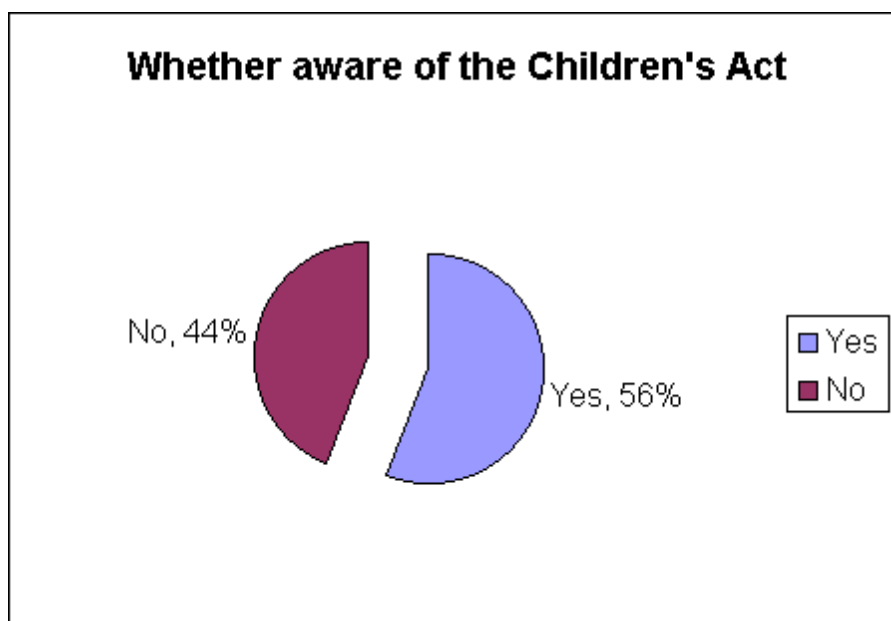


### Notes

Most of the respondents got information on the Children's Courts through media which accounted for 69% of the total sample.

Print media was the most popular channel of disseminating information on the Courts.

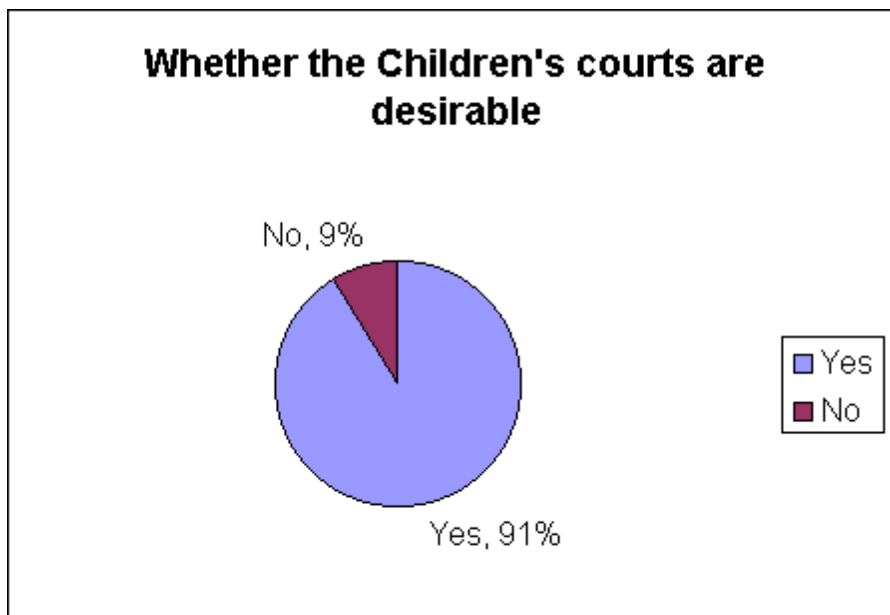
### Whether aware of the Children's Act



Almost half of the respondents were not aware of the Children's Act even though it had been in existence for over one and half years.

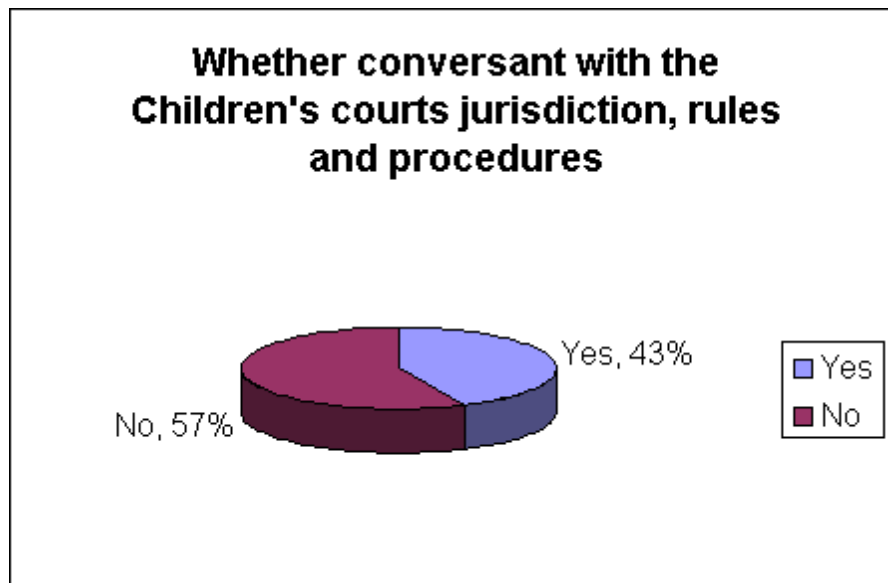


### Whether the Children's Courts are desirable



Majority of the respondents said that these courts desirable.

**Whether conversant with the Children's Courts jurisdiction, rules and procedures**



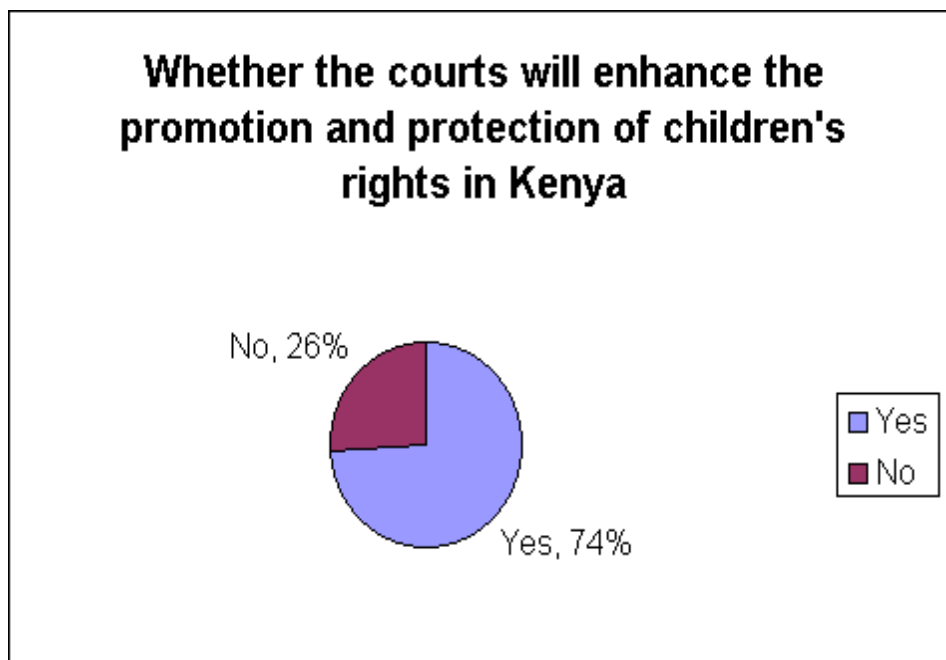
Majority of the respondents were not conversant with the Children's courts' jurisdiction, rules and procedures.

**Whether the courts will enhance efficiency, competence and effectiveness in the Judiciary**



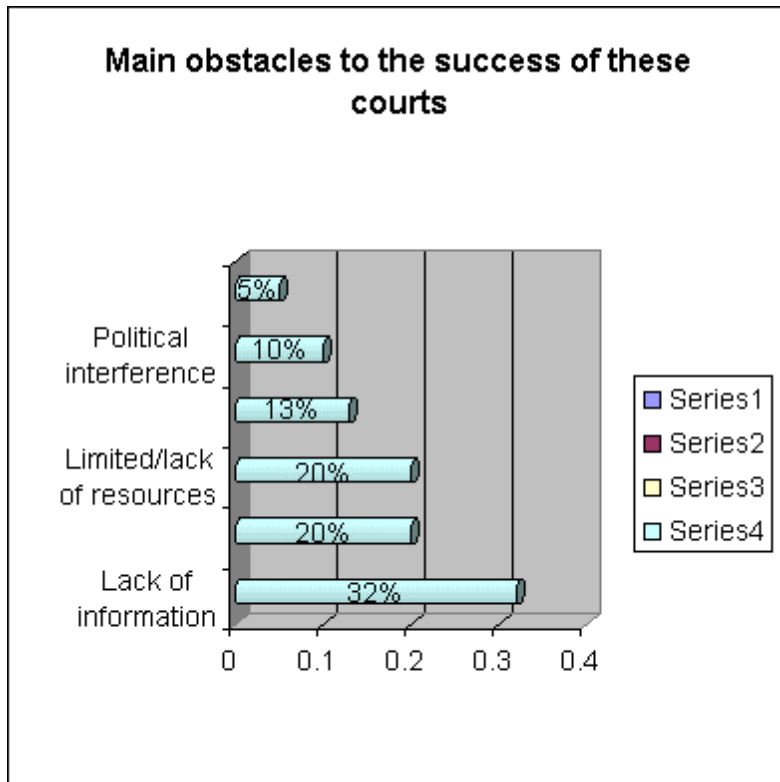
Majority of the respondents thought these courts will enhance judicial efficiency if properly implemented.

**Whether the Children's courts will enhance the promotion and protection of children's rights in Kenya**



Majority of the respondents thought these courts will enhance the promotion and protection of children's rights in Kenya.

### Main obstacles to the success of these courts



Lack of information	– 32%
Inaccessibility to the courts	– 20%
Limited/lack of resources	- 20%
Lack of training for judicial officers	- 13%
Political interference	- 10%
Poverty	- 5%

### Notes

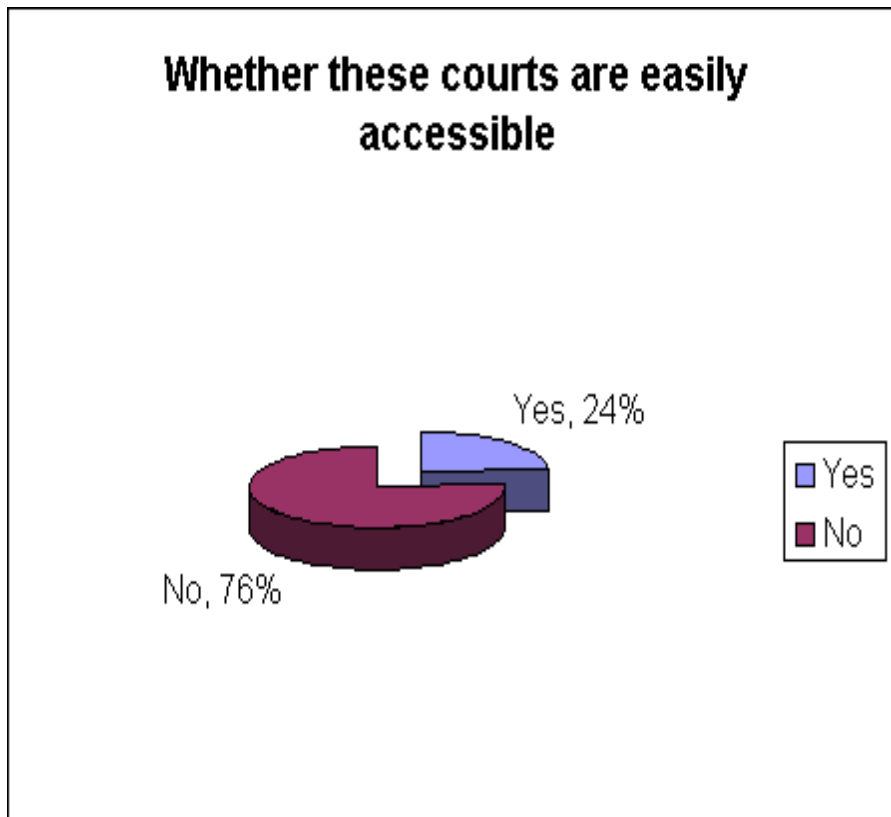
- ❖ Lack of information on these courts pose the biggest threat to their success.
- ❖ Other major threats are inaccessibility to the courts and lack of adequate resources.

**Whether the courts will have a positive impact on the administration of justice in Kenya**



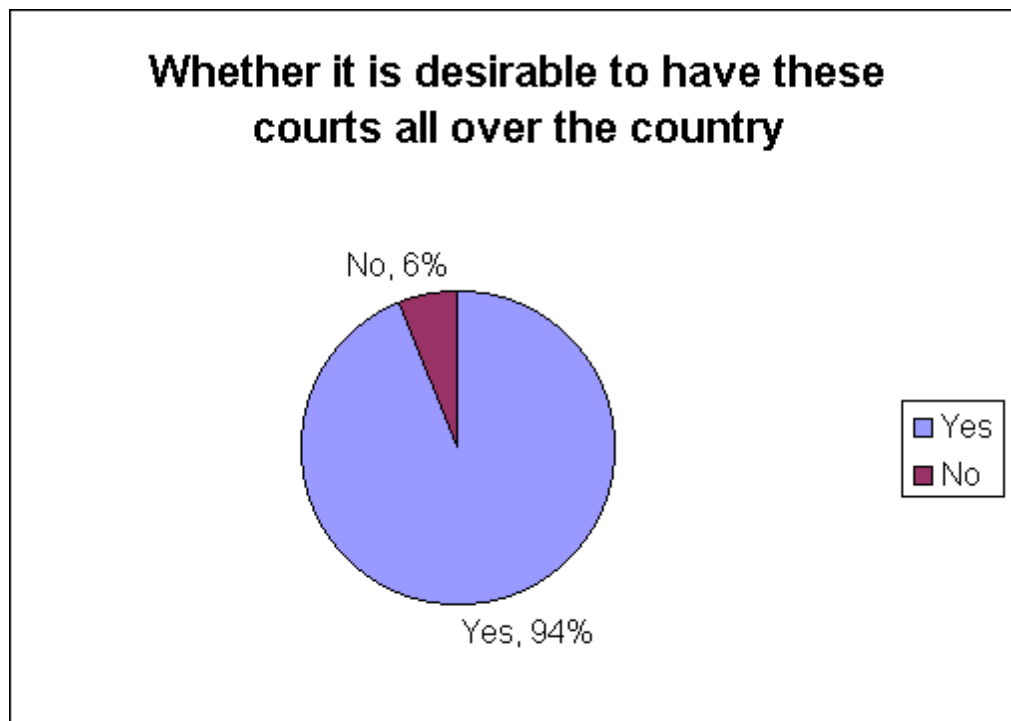
Majority of the respondents believed that these courts could have a positive impact on the administration of justice in Kenya if properly implemented.

**Whether these courts are easily accessible**



Majority of the respondents thought these courts are inaccessible due to various factors.

**Whether it is desirable to have these courts all over the country**



In order to increase accessibility to these courts, most respondents called for a wide distribution of these courts all over the country.



## **Chapter Three**

### **ANTI - CORRUPTION COURT**

Due to rampant corruption in the country, there has been a lot of clamour to establish an independent court to specifically deal with corruption cases. Various initiatives have been undertaken before aimed at curbing this vice. In 2000, an independent body, Kenya Anti-Corruption Authority (KACA) was established by the government to fight corruption in Kenya. This body however, was later disbanded following a court order that found its existence and operations unconstitutional. The bone of contention and the reason for outlawing this body was the exercising of its prosecutorial role, which the court established lies in the office of the Attorney General only. This decision was met by a lot of hostility from a cross section of Kenyans most who viewed the move as a ploy by the government to using the Judiciary to protect corrupt government officials. Nonetheless, the public and other forces including the donor community and other institutions such as, International Monetary Fund (IMF) and the World Bank continued to press the government to establish a special court and an independent body to deal with corruption.

In 2002, the Chief Justice set up a magistrate's court to specifically deal with corruption cases. This court sits in Nairobi and has its own independent registry. The court so far has two magistrates presiding over matters. It is important to note that this court operates under the High Court. The court does not have investigation and prosecution powers. It has been argued by many that this court offers very little hope in the fight against corruption. Operations of the court are shrouded in a lot of mystery and many people are not conversant with its functions or jurisdiction. This makes the court inaccessible to most people.

Most respondents think this court was established as a 'window dressing' exercise by the government so as to attract donor funding. They do not view it as an initiative brokered by the government of Kenya for the people of this country, hence it does not qualify to be termed as the government's commitment in the fight against corruption. Ours recent survey confirmed this school of thought<sup>22</sup>.

The Judiciary itself ranks very highly among the most corrupt public institutions in the country, and therefore, many commentators allay fears that the Judiciary cannot be fully trusted with the task of effectively fighting corruption in the country. Various reports have attested to the fact that corruption is prevalent and rampant in the Judiciary.

In 1998 the Judiciary itself set up a Committee to assess administration of justice in Kenya, which was headed by Hon. Justice Richard Kwach, J.A. In their report, the committee established that there were rampant cases of corruption in the Judiciary. They categorized

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<sup>22</sup> The World Bank and IMF have insisted on the establishment of a Corruption Court to fight and deal with corruption cases as one of their pre-conditions to financial support to Kenya.

corruption within the Judiciary into two main categories, namely, 'petty' corruption and 'grand' corruption. 'Petty' corruption was mainly confined to the junior staff while the 'grand' corruption was the domain of high ranking judicial personnel such as judges. 'Petty' corruption was mainly attributed to inadequate remuneration and poor terms of service.

The report established that corruption within the Judiciary takes various forms such as;

- Inducing court officials to lose or misplace files
- Delaying trials, judgments and rulings
- Fraud
- Bribery
- Utilization of public resources for private gain
- Deliberate loss of court records
- Deliberate alteration of court records, among others

The committee highlighted various factors as evidences of corruption in the Judiciary. These includes,

- ❖ Interaction with litigants or their relatives
- ❖ Visitors in chambers
- ❖ Business deals
- ❖ Undue familiarity with the Bar and the local populace
- ❖ Lack of transparency in discharge of judicial function
- ❖ Lack of transparent and merit based judicial appointment system

The report also stated in summary some of the causes of judicial corruption as,

- Overstaying in one station by judicial officers
- Inadequate remuneration
- Poor terms of service
- Lack of proper vetting especially in the appointment of judges.

Other than the committee's report that confirmed the existence of corruption in the Judiciary, other events within the Judiciary itself have attested to this fact. In May 2001, there was a public fallout between court of appeal judges with one of the three judges accusing his colleagues of corruption. In Express (K) Ltd vs Manju Patel, Court of Appeal, Civil Appeal No. 158/2000, Justice Richard Kwach, J.A. alleged corruption against his brother judges, Justice Philip Tunoi and Justice Amritlal Shah, J.J.A. while dissenting in his ruling. Such accusations and allegations between judges of the highest court in the land are very serious and cause to worry.

There have been such allegations and accusations from various quarters particularly in the last five years. Some of the most notable ones include;-

1. Ochieng' Oduol's<sup>23</sup> assertion that Justice Richard Kuloba<sup>24</sup> received Kshs. 5 million bribe from businessman Kamlesh Pattni in a case that involved Ibrahim Ali (Ochieng's client) and Pattni over the ownership of Kenya Duty Free Complex. The assertion was published in a daily newspaper and was apparently based on an affidavit sworn by Ali and drawn and filed by Oduol. Justice Kuloba has since sued Mr. Oduol for defamation and the matter is still pending in court.
2. Tony Gachoka, a publisher of the then *Sunday Post* was jailed for contempt of court after he made some serious allegations of bribery and impropriety against the late Chief Justice Chesoni.
3. In February 2002, Transparency International (Kenya Chapter), published their report on bribery and corruption in Kenya among the public institutions. In the report, the Judiciary ranked 6<sup>th</sup> with 32.2 points. The police which plays a crucial role in the administration of criminal justice ranked as the most corrupt institution.<sup>25</sup> With such high rankings for these two institutions majority of the population is left with very little trust in the country's judicial system, and more so, the Judiciary's role in the fight against corruption.

Other reports and surveys have alluded to the fact that corruption is prevalent in the Judiciary.

- a. In the past two years, ICJ (Kenya) has published two reports on the judicial reforms and public perceptions of the Judiciary which discussed in depth judicial corruption in Kenya<sup>26</sup> These reports indicated that corruption is very serious in the Judiciary.
- b. In May 2002, an Advisory Panel of Eminent Commonwealth Judicial Experts came to Kenya courtesy of the Constitution of Kenya Review Commission (CKRC), the Judiciary and ICJ (Kenya) to give recommendations and proposals on the Judiciary in the new constitution. In their report, they found rampant corruption in the Judiciary stating that '*complaints of corruption exceeded level that can be expected or tolerated*'<sup>27</sup>.
- c. The Commercial Justice User Survey carried out by British Department for International Development in East Africa (DFID-EA) in January 2000 stated that 81% out of a sample of 336 interviewees confirmed that Judiciary was corrupt.

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<sup>23</sup> He is an Advocate of the High Court of Kenya and a member of the Council of the Law Society of Kenya.

<sup>24</sup> Judge of the High Court of Kenya

<sup>25</sup> Urban Bribery Report by Transparency International (Kenya Chapter), 2001 see also February Issue of ADILI.

<sup>26</sup> Strengthening Judicial Reforms : Performance Indicators – Public Perceptions of the Kenya Judiciary (2001) and Strengthening Judicial Reforms in Kenya, Vol II: The role of the Judiciary in a patronage system

<sup>27</sup> Kenya Judiciary in the new Constitution: Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, 2002.

These and many more findings have confirmed how serious corruption is in the Judiciary. It is saddening to note that very little effort has been made to stamp out this menace. This is confirmed by the findings that have been recorded as late as September 2002. The recommendations of the Kwach committee made in 1998 have not been implemented to date, and issues raised in various reports on judicial corruption have not been addressed both by the government and the Judiciary.

When the High Court outlawed Kenya Anti-Corruption Authority (KACA) affirming that it was unconstitutional, many people viewed the move as a ploy by the powers that be, of using the Judiciary to protect themselves against corruption charges. At the time of its disbandment, KACA had enlisted some senior members of the society across the spectrum whom it was investigating for corrupt practices. The list included senior cabinet ministers, permanent secretaries, heads of parastatals and other senior government officials.

Many respondents believe that corruption is very high because the criminal justice system has failed. The Judiciary and the police force have been heavily blamed for this failure. Many believe that if the criminal system was functioning well, then corruption court would be unnecessary since corruption being a criminal offence it would have been dealt with in accordance with the criminal law in Kenya. Rampant judicial corruption has affected most court decisions since most of them are determined not on the basis of evidence and the law, but on improper influences, inducements, pressures, threats, interferences among other factors.

From our survey, most respondents stated that the magistrate's corruption court offered very little, if any hope to the fight against corruption. Various factors were attributed to this skepticism, which include:-

- The fact that corruption is deep-rooted in the society hence a mere creation of the court without willingness to change the public perception and attitude won't eradicate it. It is the responsibility of the government first and foremost, the Judiciary and all Kenyans to forge forces in the fight against this menace. The government's commitment and willingness to fight corruption has been lacking. The Judiciary itself is touted to be corrupt and therefore it is not expected to fight corruption effectively. Members of the bench are themselves guilty of being involved in corrupt practices, therefore their enthusiasm to fight it is wanting, coupled by the fact that even if charged with the offence, judicial conspiracy cannot be totally dismissed. In order for this court to function effectively, it must be independent and must not function as an integral part of the court hierarchy. This is a necessary measure because this court cannot be expected to achieve its objectives while it is operating under the current High Court which many perceive to be tainted with corruption.
- Lack of independence of the Judiciary. The current bench lacks both personal and institutional independence to effectively fight corruption. In order to curb interference and guarantee the independence of a corruption court, there is need to have the court entrenched in the Constitution. Therefore, there is need to enact legislative and constitutional provisions against corruption and the court itself. Currently, the 'corruption court' is operating under the Magistrates' Act exposing it

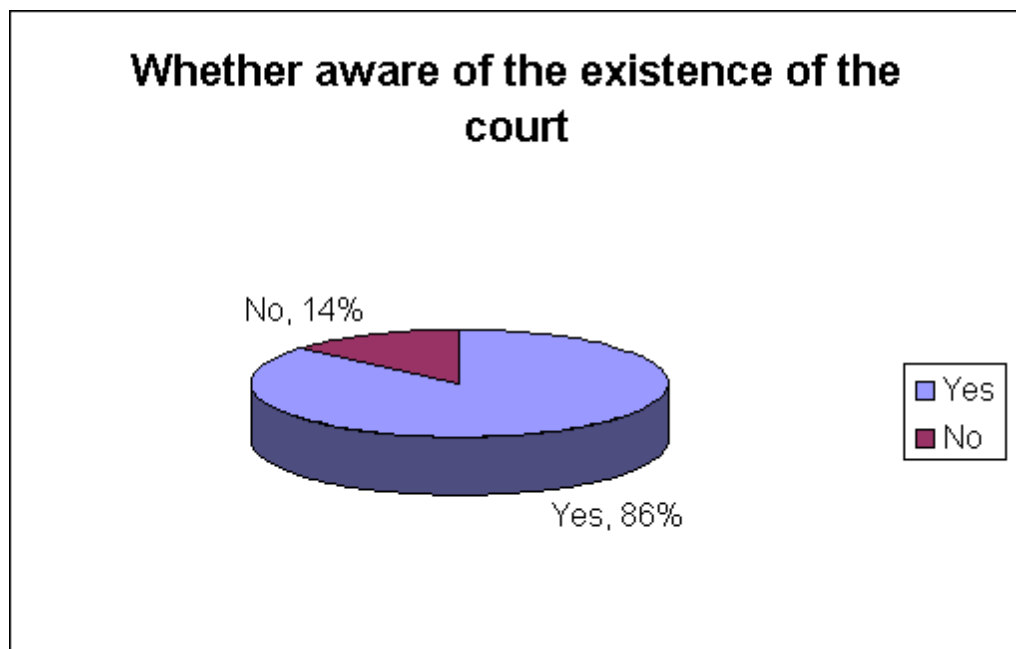
to the danger of being challenged and shot down under s.77 of the Constitution of Kenya.

Other than expanding the court's jurisdiction, the powers to investigate and prosecute should be vested in this court if any meaningful impact is expected. As currently constituted, the court has no powers to prosecute and investigate hence selective administration of justice is prevalent here. This role is played by the police are perceived by many people to be very corrupt that they cannot be trusted to do a thorough job in curbing this menace. Further, the current police force is perceived to be ill-trained to handle such matters.

To strengthen this court, all officers appointed must show and prove that they have a corruption-free record. The criteria for their appointment should be laid down in the Constitution with a special body vested with the powers to appoint such officers. Personal independence must be enhanced by ensuring that the officers enjoy security of tenure and financial security, as well as ensuring that they subscribe to a comprehensive code of conduct.

- Lack of political will to fight corruption. The creation of the court was seen as an exercise to please the donor community and not something for the Kenyans themselves. The shooting down of Kenya Anti-Corruption Authority (KACA) through the Judiciary shows the government's and Judiciary's lack of commitment in the fight against corruption.
- There is need for stiffer penalties so far as corruption offences are concerned. The penalty should include returning to the government everything that was corruptly acquired.
- The need to establish this court all over the country. This will increase accessibility to the court. Currently, the court sits in Nairobi only.
- Reduce on the lengthy procedures which make matters in the court drag. For example, the requirement to seek consent from the Attorney General before a matter can proceed should be scrapped.
- The court's performance so far is not encouraging as those arraigned in it are people charged with petty corrupt offences. This selective prosecution will not fight corruption. It is important that even those involved in grand corruption be arraigned and charged in this court and appropriate sentence prescribed, which must be executed accordingly.

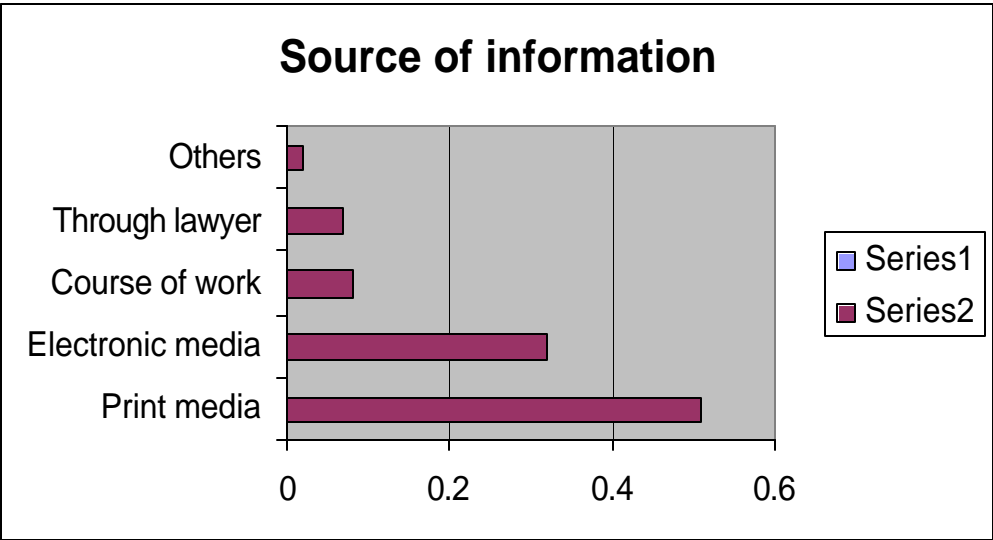
**Whether aware of the existence of the court**



Majority of the respondents were aware of the existence of the Magistrate's Corruption Court.

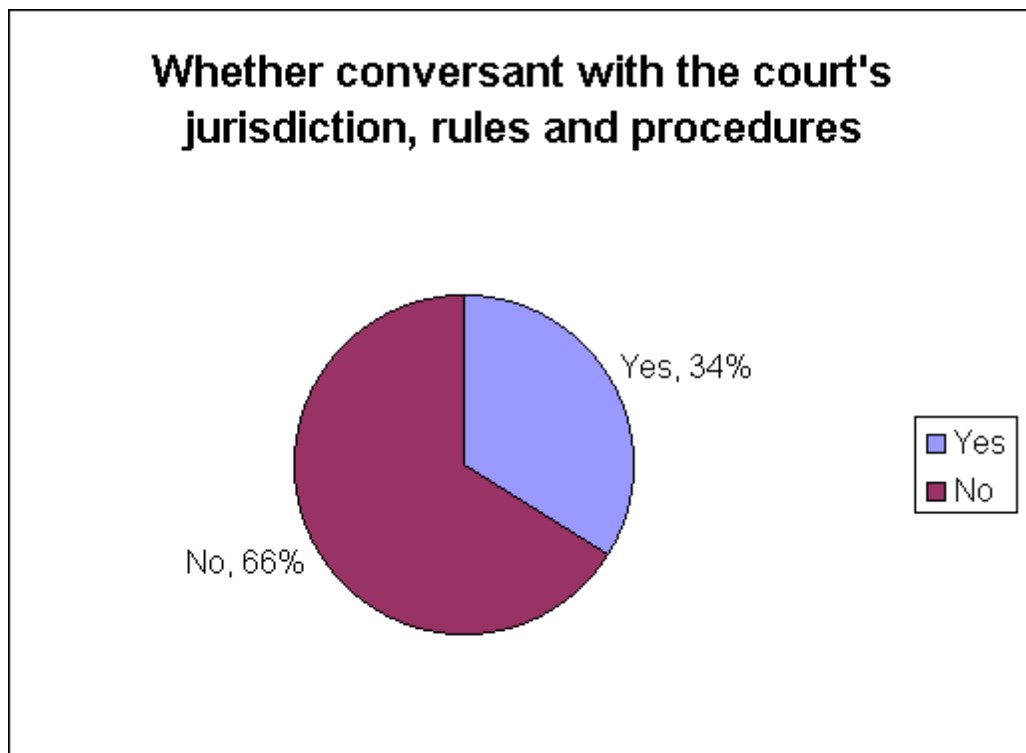
**Source of information on the court**

Print media	51%
Electronic media	32%
Course of work/Profession	8%
Through a lawyer	7%
Others	2%



84% of the respondents got information on the court through the media

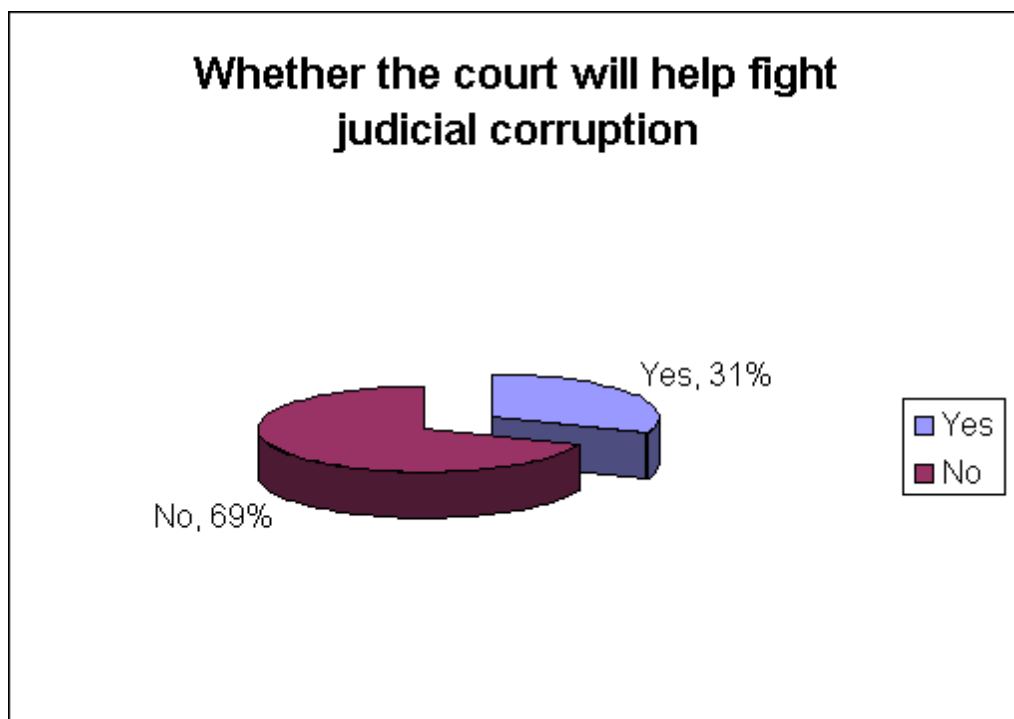
**Whether conversant with the court's jurisdiction, rules and procedures**



Majority of the respondents were not aware of the court's jurisdiction, rules and procedures.

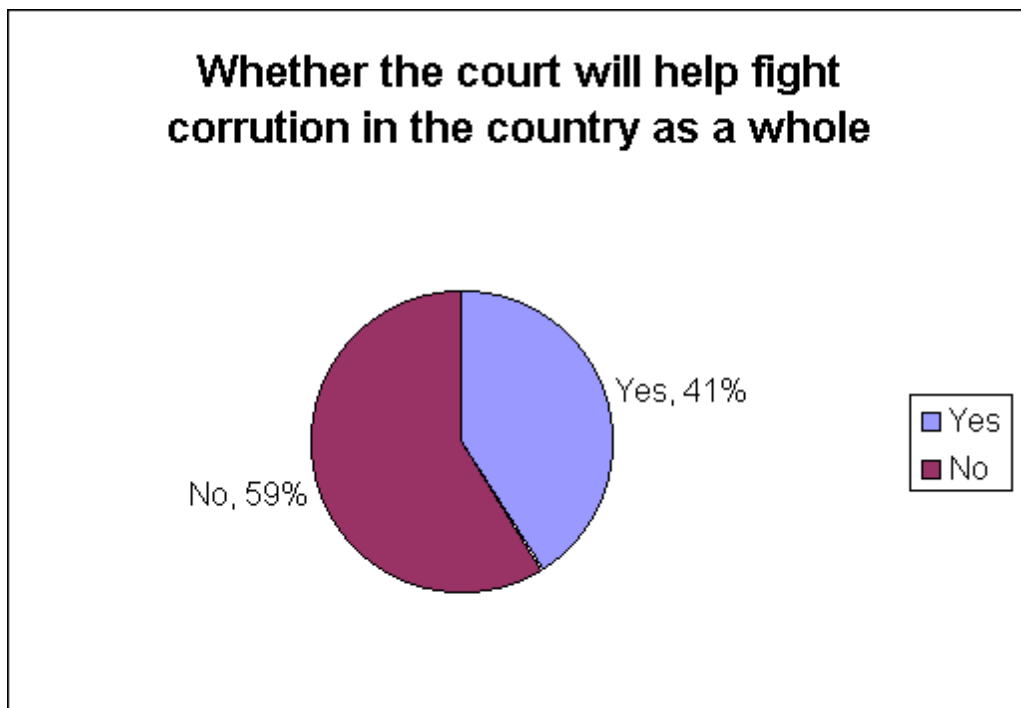


**Whether the court will help fight corruption in the Judiciary**



Majority of the respondents did not think this court would help fight judicial corruption

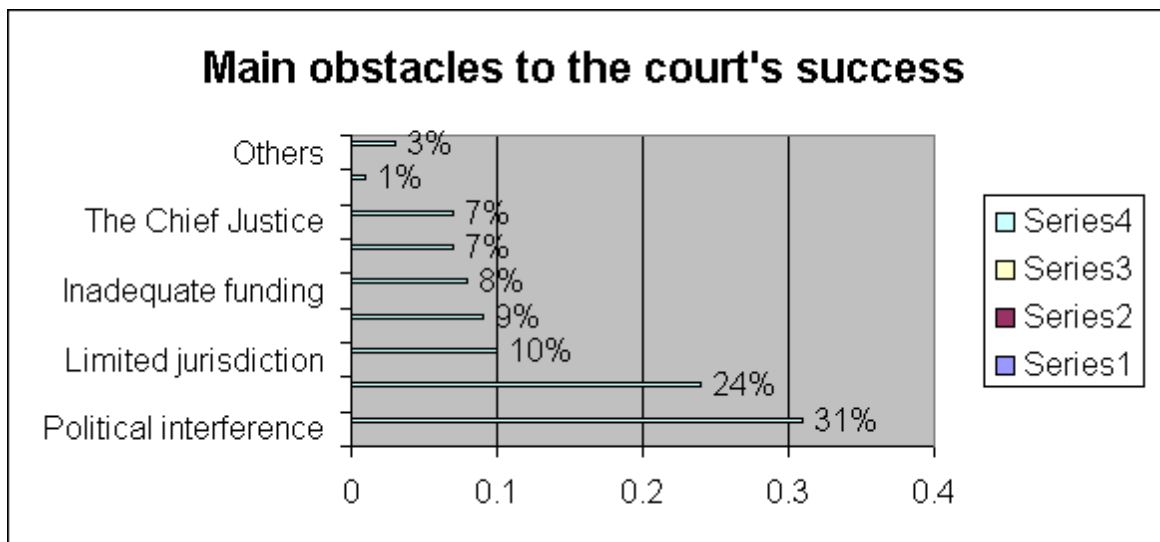
**Whether the court will help fight corruption in the country as a whole**



Majority of the respondents do not believe that this court will fight corruption in the country. With high negative ratings on the court's ability to stem corruption, there is no doubt that most Kenyans do not support the current court in the fight against corruption.

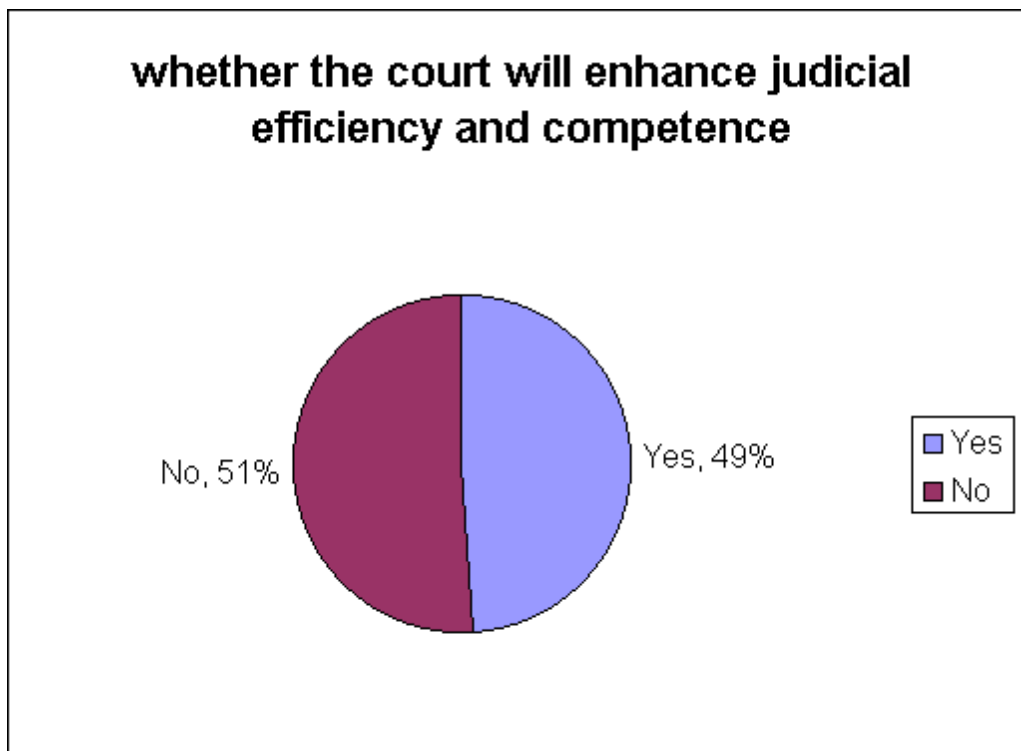
### Main obstacles to the success of the court

Political interference	31%
Lack of independence	24%
Limited jurisdiction	10%
Conservative judges	9%
Inadequate funding	8%
Inadequate public support	7%
The Chief Justice	7%
Inefficient prosecution	1%

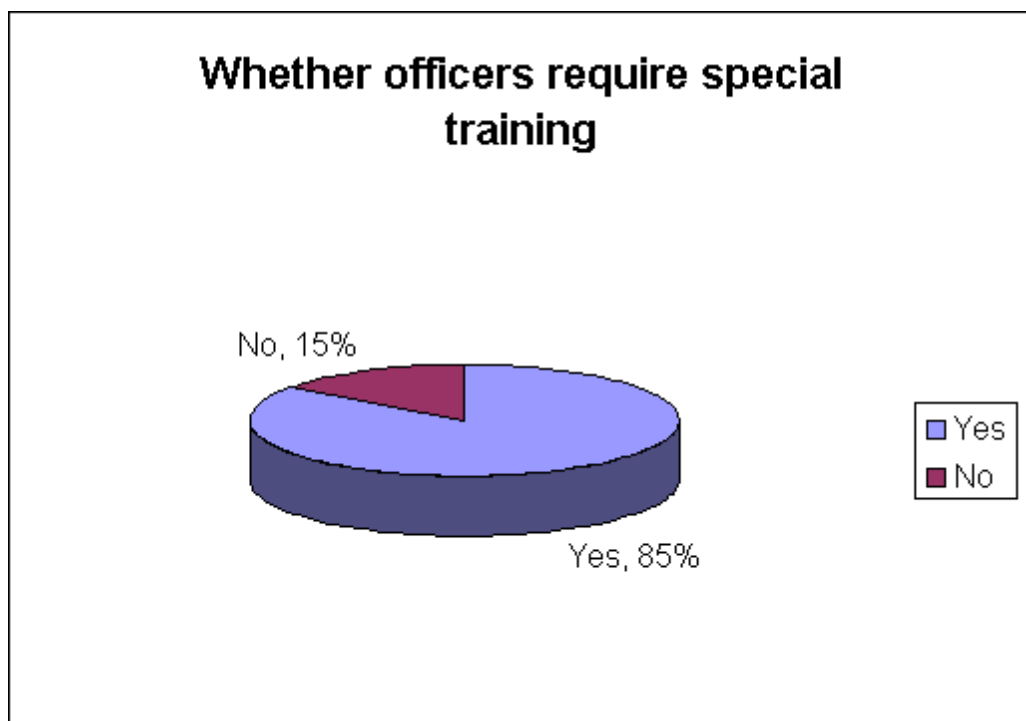


Political interference, lack of independence and limited jurisdiction are the chief factors that threaten the success of this court. The judges and the Chief Justice were also perceived as threats to the court's success.

**Whether the court will enhance judicial efficiency and competence**

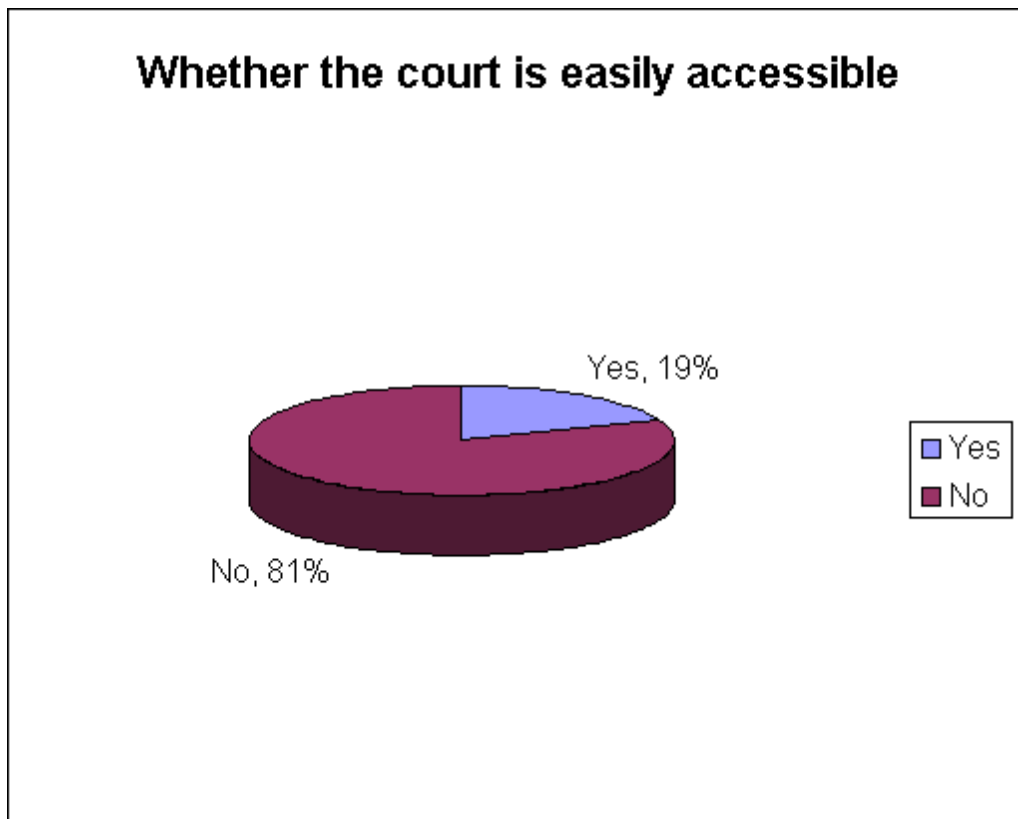


### **Special training for judicial officers in this court**



Majority of the respondents wanted officers handling cases in this court undergo a special training so as to equip them with the skills and knowledge necessary in handling corruption matters.

### **Accessibility to the Court.**



Majority of the respondents stated that this court is inaccessible due to various factors, which include,

- ❖ Lack of information on the court. Thus, majority of the respondents did not know the functions and operations of the court.
- ❖ Geographical location of the court. This court sits in Nairobi only, making it difficult for people outside Nairobi accessing it.
- ❖ Lengthy and complex procedures, such as requiring the Attorney General's consent prior to the commencement of a suit.

## CONCLUSION

Sustainable judicial reform is a process that encompasses all stakeholders. Lasting and effective solutions to the problems which have plagued the judicial system and the legal system as a whole depend on an accurate assessment of the root causes. Availability of funds and even setting up of special courts and other structures in the Judiciary are important, but are not the only factors that must be tackled in order to ensure effective judicial reform. In Kenya, for example, there is a dire need to fight judicial corruption and restore the independence of the Judiciary if we hope to achieve any meaningful and sustainable judicial reforms.

A favourable judicial attitude towards reform is a fundamentally important variable. The Judiciary must be willing to co-operate with other stakeholders and on its own be willing to reform. For instance, judicial ethics must be fully internalized by members of the Judiciary. Administrative reforms like the ones addressed in this publication if properly implemented will help speed up judicial resolution of conflicts while also serving the important purpose of restoring public faith in the judicial system. However, such reforms *per se* without proper implementation do not guarantee successful judicial reform. A successful judicial reform has been said to include *inter alia*;

- 1) Improving the quality and efficiency of the administration of justice.
- 2) Rationalising laws and procedures.
- 3) Improving the internal administration of tribunals.
- 4) Improving the training and education of judges and legal officers.
- 5) Developing and utilizing alternative methods of dispute resolution.
- 6) Enabling and maintaining independence of the Judiciary.
- 7) Controlling cost measures.
- 8) Increasing and enabling access to justice by the poor.<sup>28</sup>

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<sup>28</sup> Diego Garcia –Sayan, ‘The role of international financial institutions in judicial reform’, CIJL Yearbook, 1999, volume VII, p.45